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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-829

LEILA MOURNING,

Petitioner,

v.

FAMILY PUBLICATIONS SERVICE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Florida (App. 32-35) is reported at 4 CCH CONSUMER CREDIT GUIDE ¶ 99,632 (1970) (Mehrtens, J.). The opinion of the United States Court of Appeals for the Fifth Circuit (App. 40-54), reversing the decision of the District Court, is reported at 449 F. 2d 235 (1971).

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1971 (App. 54). The petition for a writ of

certiorari was filed on December 23, 1971, and granted on March 20, 1972 (App. 55); 405 U. S. 987. The jurisdiction of the Court is invoked under 28 U. S. C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statute to be construed is the Truth in Lending Act, 15 U. S. C. §§ 1601-65 (1970). The regulation in issue is to be found in Regulation Z, 12 C. F. R. §§ 226.1-.13 (1972), promulgated by the Federal Reserve Board. The relevant provisions of the Act and of Regulation Z are set forth in an Appendix to this brief, *infra*.

QUESTIONS PRESENTED

The Truth in Lending Act provides that "creditors" who regularly extend credit "for which the payment of a finance charge is required" (15 U. S. C. § 1602(f)) shall disclose the amount of the finance charge and other specified information in transactions which entail a finance charge (15 U. S. C. § 1631(a)). For failure to make the statutory disclosures, the Act imposes civil penalties (15 U. S. C. § 1640(a)) upon creditors in an amount equal to "twice the amount of the finance charge in connection with the transaction, except . . . [not] less than $100 nor greater than $1,000. . . ." The four installment rule of Regulation Z promulgated by the Federal Reserve Board provides that the required disclosures must be made in credit transactions involving repayment in more than four installments, regardless of whether a finance charge is entailed (12 C. F. R. §§ 226.2(k), (m) and (bb), 226.8(a)).

The questions presented by this case are:

1. Whether the court below erred in holding that the Federal Reserve Board acted in excess of its authority under the Truth in Lending Act in promulgating the four installment rule of Regulation Z.

2. Whether a civil penalty may be imposed under 15 U. S. C. § 1640(a) in connection with a transaction that does not involve a finance charge.

3. Whether transactions in which consumers prepay for goods involve an extension of credit within the meaning of the Truth in Lending Act.

STATEMENT OF THE CASE

Respondent, Family Publications Service, Inc. ("FPS"), was engaged in the business of offering subscriptions to a large number of magazines on what is commonly known as a paid-during-service ("P-D-S") basis.* As is common under P-D-S plans, FPS's standard form of contract provided for the delivery of the magazines selected by the customer over 48 (or 60) months, for which the customer paid on a monthly basis over the first 24 (or 30) months.** Under this plan, at every point in time prior to the end of the contract period, the customer has paid for more issues than he has received so that the payments are in fact prepayments by the customer for magazines to be delivered to the customer in the future (App. 41).

Under the terms of the FPS contract executed by petitioner on August 19, 1969, she was to receive *Ladies Home Journal, Holiday, Life,* and *Travel and Camera* for 60 months in return for an initial payment of $3.95 and 30 monthly payments of $3.95 (App. 41). Although she received the magazines ordered, petitioner defaulted on her contract and never made any payments beyond the initial

*The court of appeals also held the Board's four installment rule the date of its incorporation in 1958 until it terminated selling operations in February 1971.

**In a relatively small number of cases FPS's customers elected to pay the full purchase price at the outset rather than over 24 (or 30) months. Subsequent to the proceedings below we have discovered that, contrary to representations made below, a small number of those customers (representing a small fraction of 1% of FPS's total customers) may have been charged less than the aggregate purchase price under FPS's standard form of contract.

$3.95 payment. Consequently, her contract was cancelled by FPS on April 15, 1970 (App. 41-42).

Petitioner Mourning commenced this action in the United States District Court for the Southern District of Florida on April 23, 1970, on her own behalf and on behalf of a class comprised of all residents of Dade County, Florida, who had entered into contracts with FPS since July 1, 1969 (the effective date of the Truth in Lending Act). The second amended complaint ("the complaint") alleged that the FPS standard form contract did not contain the disclosure of credit terms required by the Truth in Lending Act and the Regulations promulgated thereunder by the Federal Reserve Board ("the Board"). The complaint prayed for a civil penalty of not less than $100 nor more than $1,000 on behalf of each member of the class, together with attorneys' fees and the cost of the action, as provided for in 15 U. S. C. § 1640(a) (App. 2-5).

The Act provides that creditors who regularly extend consumer credit "for which the payment of a finance charge is required" (15 U. S. C. § 1602(f)) shall make specified disclosures (15 U. S. C. § 1631(a)), including the amount of the finance charge and the finance charge expressed as an annual percentage rate (15 U. S. C. § 1638(a)(6)-(7)). Regulation Z promulgated by the Board provides that such disclosures must be made in credit transactions involving repayment in more than four installments, regardless of whether a finance charge is involved (12 C. F. R. §§ 226.2(k), (m) and (bb), 226.8(a)). For failure to make the required disclosures, the Act imposes both criminal (15 U. S. C. § 1611) and civil penalties (15 U. S. C. § 1640(a)), as well as administrative sanctions under the Federal Trade Commission Act (15 U. S. C. § 1607(c)). The civil penalty section of the Act under which petitioner's claim arises, provides that

> "any creditor who fails in connection with any consumer credit transaction to disclose to any person

any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

(1) twice the amount of the finance charge in connection with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000 . . . ." 15 U. S. C. § 1640(a).

On August 28, 1970, both parties moved for summary judgment. Petitioner contended that her transaction with FPS was subject to the Act solely by virtue of Regulation Z because it was a credit transaction payable in more than four installments and that she was entitled to recover a civil penalty regardless of whether the transaction entailed a finance charge. Petitioner asserted that the absence of a finance charge was irrelevant—since none was required under the four installment rule. (Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 5.) FPS contended that the transaction was not subject to the disclosure and penalty provisions of the Act because, *inter alia*, (1) it was not a credit transaction, (2) the disclosure and penalty provisions of the Act do not apply in the absence of a finance charge, and (3) the Regulations could not properly extend the scope of the Act. Both parties concurred in the view that there were no material issues of fact and that the question to be decided was the proper reach of the disclosure and penalty provisions of the Act and the Regulations.

On November 27, 1970, the district court rendered its final decision (1) dismissing the class action allegations in the amended complaint, (2) denying FPS's motion for summary judgment, and (3) granting judgment in favor of petitioner in the amount of $100, together with $1,500

attorney's fee and costs. The court held that "the transaction here in question falls squarely within the scope of the Act and its Regulations *by virtue of the 'more than four installments' rule,* 12 C. F. R. § 226.2(k). . . ." (App. 34) (emphasis added).

On December 11, 1970, FPS filed its notice of appeal from the district court's order and from the judgment entered thereon in so far as the order granted plaintiff's motion for summary judgment and denied FPS's motion for summary judgment.

On September 27, 1971, the court of appeals held the four installment rule invalid and reversed and remanded with directions that the complaint be dismissed. The court found that under the Act "three essential elements must be found present together in a transaction" before the duty to make the specified disclosures arises: (i) a creditor (ii) who extends consumer credit (iii) in a transaction which entails a finance charge (App. 49). The court also found, in accord with the position taken by the United States as amicus curiae, that under the regulation promulgated by the Federal Reserve Board

> "in order for the disclosure and penalty provisions of the Truth-in-Lending Act to be applicable, all that is required is that the transaction involve the extension of credit which, pursuant to agreement, is or may be payable in more than four installments. No showing or finding of the imposition, directly or indirectly, of a finance charge is necessarily required." (App. 50.)

The court concluded that "an inconsistency exists between the four installment rule and the Truth-in-Lending Act" (App. 50) and that, in promulgating the rule, the Board had "over-stepped the authority granted to them

under 15 U. S. C. § 1604." (App. 51.) Relying on this Court's decisions in *Commissioner* v. *Acker,* 361 U. S. 87 (1959), and similar cases, the court of appeals held that the Board's rule constituted an invalid "administrative endeavor to amend the law as enacted by the Congress and to thereby make the Act reach transactions which the Congress by its statutory language did not seek or intend to cover by its enactment." (App. 51.)*

Having found the Act inapplicable to the transaction in issue by reason of the invalidity of the four installment rule, the court of appeals did not find it necessary to consider FPS's further contentions (1) that the civil penalty provision of the Act, providing for a penalty equal to "twice the amount of the finance charge" imposed, is inapplicable where the transaction in question does not involve a finance charge, and (2) that the Act is inapplicable because FPS did not extend consumer credit but rather was prepaid by its customers.

SUMMARY OF ARGUMENT

I.

The court of appeals correctly held that the four installment rule of Regulation Z, 12 C. F. R. § 226.2(k), is an invalid attempt by the Federal Reserve Board to bring within the ambit of the Truth in Lending Act, 15 U. S. C. §§ 1601-65 (1970), transactions which Congress has explicitly put beyond the scope of the Act. The Act imposes

*The court of appeals also held the Board's four installment rule invalid as constituting a conclusive presumption violative of the due process clause of the Fifth Amendment. We do not believe that it is necessary to reach this constitutional ground and we do not rely on it. We concur in the view expressed by petitioner that Congress could have enacted the four installment rule without violating the due process clause. A bill intended to accomplish that result was passed by the Senate on April 27, 1972, and is currently before the Consumer Affairs Subcommittee of the House Banking and Currency Committee, S. 652, 92nd Cong., 2nd Sess.

certain requirements of disclosure upon creditors. The term "creditor" is defined to include "*only* [those] creditors who regularly extend . . . credit for which the payment of a finance charge is required . . . ." 15 U. S. C. § 1602(f) (emphasis added). Such creditors are required to disclose specified information relating to the cost of credit "to each person . . . upon whom a finance charge is or may be imposed . . . ." 15 U. S. C. § 1631(a). Finally, under Section 1640(a) such creditors are liable for a civil penalty in an amount equal to "twice the amount of the finance charge in connection with the transaction, except . . . [not] less than $100 nor greater than $1,000 . . . ." 15 U. S. C. § 1640(a).

Notwithstanding the congressional decision to require the statutory disclosures only in connection with credit transactions involving a finance charge, Regulation Z purports to require such disclosures in connection with credit transactions repayable in four or more installments regardless of whether a finance charge is imposed. Petitioner's claim against FPS is based solely on the four installment rule and petitioner concedes that the transaction in issue is not subject to the substantive provisions of the Act which require the presence of a finance charge. The four installment rule is invalid because it is in conflict with the intention of Congress as manifested by the language of the Act and the legislative history. The congressional committee reports make it particularly clear that Congress intended that the disclosure requirements of the Act be limited to transactions involving finance charges. A bill pending before Congress was amended expressly for the purpose of making clear that the disclosure requirements would not apply to transactions in which a finance charge is not involved.

Although petitioner and the Government argue that the four installment rule is necessary to effectuate the purpose of the Act and prevent circumvention of the Act, in fact it does neither. In particular, it does not solve the problem

presented by the buried or hard-to-find finance charge. The Government's thesis that creditors subject to the Act may satisfy their statutory obligations merely by disclosing total price without separately identifying the cost of credit is without warrant in either the Act or the Regulation and is subversive of the statutory purpose.

The conclusion reached by the court of appeals that the Board, in promulgating the four installment rule, "overstepped the authority granted to them under 15 U. S. C. § 1604" (App. 51) is clearly supported by the decisions of this Court. *See, e.g., Federal Communications Commission* v. *American Broadcasting Co., Inc.*, 347 U. S. 284 (1954); *Commissioner* v. *Acker*, 361 U. S. 87 (1959); *Miller* v. *United States*, 294 U. S. 435 (1935).

II.

The judgment of the court of appeals is sustained on two independent considerations that were advanced by FPS below but which the court of appeals did not find it necessary to reach. *See Langnes* v. *Green*, 282 U. S. 531 (1931).

First, whether or not the disclosure requirements and the administrative enforcement provisions of the Act are applicable in the absence of a finance charge, the civil liability provision, under which petitioner's claim arises, is inapplicable. That provision (15 U. S. C. § 1640(a)) specifies that recovery of an amount equal to "twice the amount of the finance charge in connection with the transaction, except that the liability . . . shall not be less than $100 nor greater than $1,000 . . . ." The finance charge provides the initial measure of the award. The legislative history supports the view that the minimum and maximum dollar amounts cannot reasonably be construed as providing an alternative means of determining the amount of an award in the absence of a finance charge because the

language of Section 1640(a) is not susceptible of an "either/or" interpretation. Indeed, Congress rejected a bill which provided for liability in the alternative.

Second, the disclosure and civil penalty provisions of the Truth in Lending Act apply only to credit transactions. The Act is inapplicable to the transaction in question for the fundamental reason that the transaction did not involve the extension of credit by FPS to petitioner. It is the essence of a credit transaction that one party parts with value in reliance on the promise of another to pay at a later date. Under the standard FPS contract, however, FPS does not deliver anything in advance of payment. Quite the contrary, the customer pays in advance for the subsequent receipt of magazines. Nor does the fact that the customer contracts to make periodic payments turn his obligation into a credit obligation. "A transaction may be an instalment contract without being a credit transaction at all." 3A A. CORBIN, CONTRACTS § 687 (1960). The Board has formally recognized that an agreement to pay in installments for goods or services to be rendered in installments does not involve an extension of credit within the meaning of the Act unless the payments lag behind delivery of the goods or services. FRB Opinion Letter No. 262 (1970).

The Act adopts the common understanding of a credit transaction; and defines the term "credit" as "the right granted by a creditor to a debtor . . . to incur debt and defer its payment." 15 U. S. C. § 1602(e). A debt results from an unconditional agreement to pay and is to be distinguished from the obligations of a contract under which the performance of both parties lies in the future. Here, there is clearly no "debt" within the meaning of the Act. Petitioner's obligation to pay was contingent on performance by FPS.

ARGUMENT

POINT I

THE COURT BELOW CORRECTLY HELD THAT THE FOUR INSTALLMENT RULE IS INVALID.

Petitioner and the Government urge that the Fifth Circuit erred in holding invalid the four installment rule of Regulation Z, 12 C. F. R. § 226.2(k). The court of appeals held the rule invalid because it purported to bring transactions which do not entail a finance charge within the disclosure and penalty provisions of the Act, whereas the Act explicitly excludes such transactions from its coverage.

The court of appeals was clearly correct in concluding that the four installment rule is inconsistent with the Act and is therefore invalid. As is set forth below, three key sections in the Act (15 U. S. C. §§ 1602(f), 1631(a) and 1640(a)) as well as the legislative history of the Act make plain that the Act applies only to transactions that entail a finance charge. On the other hand, the four installment rule dispenses with that prerequisite by providing that transactions involving payment in more than four installments are subject to the Act's disclosure and penalty provisions whether or not they entail a finance charge.

There is no dispute that the Regulation eliminates the finance charge requirement imposed by the Act. Petitioner concedes that "the transaction [in issue] is not covered by the substantive provisions of the statute" and that, in the absence of the Regulation, FPS would not be subject to the disclosure requirements of the Act. Pet. Br. 11. What is in dispute is the validity of the Regulation.

Further, contrary to the impression created by the briefs of petitioner and amici, we are not concerned here with whether transactions involving hidden or buried finance charges are subject to the requirements of the Act. It is not disputed that such transactions are subject to the Act with-

out assistance from the Regulations. Indeed, the fundamental purpose of the Truth in Lending Act was to require disclosure of concealed finance charges. The question presented here is whether transactions which the Act does not reach because they do not entail finance charges may nonetheless be brought within the Act's ambit by the Regulations.

A. The rule is inconsistent with the Act.

1. The statutory language.

The Act is neither silent nor ambiguous with respect to the scope of its coverage. Three separate sections of the Act reiterate that the disclosure and penalty provisions apply only to those creditors who impose a finance charge.

Section 1602(f) provides in applicable part:

> "The term 'creditor' refers *only* to creditors who regularly extend, or arrange for the extension of, credit for which the payment of a *finance charge* is required . . . ." (Emphasis added.)

This definition makes it clear that, contrary to the Government's view (U. S. Br. 15-17, 20), Congress assumed that there are creditors who do not impose finance charges as well as those who do. Consistent with the declared statutory purpose to assure "[t]he informed use of credit [which] results from an awareness of the *cost* thereof" (15 U. S. C. § 1601) (emphasis added), the Act was directed at those who impose a finance charge.

The point is re-emphasized in the general disclosure requirement set forth in § 1631(a) which provides:

> "Each creditor [as defined in § 1602(f)] *shall disclose* clearly and conspicuously, in accordance with the regulations of the Board, *to each person* to whom consumer credit is extended and *upon*

> *whom a finance charge is or may be imposed,* the information required under this part." (Emphasis added.)*

The required information includes "the amount of the finance charge" and "the finance charge expressed as an annual percentage rate" (15 U.S.C. § 1638(a)(6) and (7)).

Finally, under § 1640(a), the civil liability for failing to make the required disclosures is imposed only on "creditors" and is stated to be "twice the amount of the *finance charge in connection with the transaction*" (emphasis added), except that such liability shall not be less than $100 nor more than $1,000. In sum, the Act is addressed only to those creditors who regularly impose a finance charge; such creditors are required to disclose the finance charge to each consumer upon whom a finance charge is or may be imposed; and the civil penalty for failing to comply is measured by the amount of the finance charge in connection with the transaction. It would be hard to imagine a more explicit insistence on a limitation of the Act to situations involving a finance charge. All of those limiting phrases would be inexplicable had Congress intended the Act to apply regardless of whether a finance charge was involved.

---

*Contrary to petitioner's statement that if a creditor "regularly" (15 U. S. C. § 1602(f)) imposes a finance charge "he must make the required disclosures in *all* of his credit transactions whether or not they involve a finance charge" (Pet. Br. 12), a creditor need make the required disclosures in only those transactions in which a charge "is" imposed or "may be" imposed upon the happening of a specified event (15 U. S. C. § 1631(a)), for example, the failure to pay within 30 days. The Act provides that the word " 'may' is used to indicate that an action either is authorized or is permitted." 15 U. S. C. § 1601 note at 3439; Pub. L. No. 90-321, § 503 (May 29, 1968). *See, e.g., Ratner* v. *Chemical Bank New York Trust Co.,* 329 F. Supp. 270, 273 (S. D. N. Y. 1971). Such transactions are herein referred to as entailing a finance charge. In any event, it is petitioner's contention that FPS is subject to the disclosure provisions of the Act solely by virtue of the four installment rule—irrespective of whether its transactions entail a finance charge.

Notwithstanding these manifestations of legislative purpose, the Board eliminated the Act's prerequisite of a finance charge. Regulation Z specifies the duties of a "creditor" (12 C. F. R. § 226.8(a), and defines "creditor" as a person who regularly extends "consumer credit" (12 C. F. R. § 226.2(m)). It is the Board's definition of "consumer credit" that establishes the four installment rule:

> "*Consumer credit means credit* offered or extended to a natural person, in which the money, property, or service which is the subject of the transaction is primarily for personal, family, household, or agricultural purposes and *for which either a finance charge is or may be imposed or which pursuant to an agreement, is or may be payable in more than four installments.*" 12 C. F. R. § 226.2 (k) (emphasis added).

That the four installment rule seeks to expand the coverage of the Act is not disputed. The district court found FPS's transactions subject to the disclosure and civil penalty provisions of the Act solely "by virtue of the 'more than four installments' rule" (App. 34-35).* Petitioner recognizes that "the transaction is not covered by the substantive provisions of the statute" (Pet. Br. 11), and acknowledges here, as she did below, that the case against FPS turns on the validity of the four installment rule. She urges that the Board has "the power to reach transactions just outside the literal reach of the

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*Petitioner maintained in the district court: "Defendant has denied any finance charge and the point is not an issue here." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 5. The Court of Appeals noted that the district court had not found a finance charge present and had relied on the four installment rule for its holding that FPS was subject to the disclosure and penalty provisions of the Act. (App. 45.)

statute" (Pet. 15) and to "go beyond the literal disclosure requirements of the Act." (Pet. Br. 8.)

Likewise, the Government recognizes, albeit grudgingly, that the four installment rule may reach "credit transactions that the provisions of the Act themselves might not cover because there are in fact no finance charges involved directly or indirectly" (U. S. Br. 9); it urges that the Board had authority to promulgate a rule which "embraces some transactions that the provisions of the Act might not, on their face, reach" (U. S. Br. 24).* A variety of arguments based on policy are advanced in support of the Board's action. We show below that those supposed policy considerations will not bear scrutiny and that the rule is in fact subversive of the purposes of the Act. First, however, we turn to petitioner's contention that the rule is not in conflict with the Act but merely serves to elaborate upon it.

It is petitioner's fundamental contention that:

> "The failure of Congress to include the instant transaction within those substantive provisions does not demonstrate any congressional intent to exempt the transaction from disclosures, but only an intent to leave regulation of the transaction to the Board." Pet. Br. 9.

This position is clearly unsound. It was easy enough for Congress to make the Act applicable to all creditors had it intended to do so. It did not do so. It specifically limited the

*To be sure, the Government also urges that Congress assumed that "whenever credit is extended the costs necessarily incurred by the creditor are in fact passed on to the consumer" (U. S. Br. 9 n.10). As we have noted above, however, the statutory definition of creditor as "only [those] creditors who regularly extend . . . credit for which the payment of a finance charge is required" is consistent only with the view that some creditors do not impose a finance charge. Moreover, as we show below, the legislative history simply does not bear out the Government's speculations as to Congress's assumptions.

scope of the Act to creditors who impose a finance charge and to transactions involving a finance charge. Futhermore, the explicit limitation of the requirements of the Act to finance charge transactions cannot rationally be said to manifest "an intent to leave regulation of [all other transactions] to the Board." Plaintiff's thesis would lead to the conclusion that the Board is authorized to regulate everything not dealt with by Congress.

Also unsound is petitioner's contention (Pet. Br. 28) that transactions not involving a finance charge are not exempted by the Act but "merely omitted from coverage" because they are not among the "exempted transactions" (*e.g.*, commercial credit, securities transactions) listed in 15 U. S. C. § 1603. Obviously, there was no need to exempt transactions not involving a finance charge because they were not covered in the first place.

In the same vein, petitioner urges (Pet. Br. 20-21) that, if the Act contained only its declaration of purpose (15 U. S. C. § 1601) and the provision authorizing the Board to issue regulations to carry out that purpose (15 U. S. C. § 1604), the four installment rule would have been entirely appropriate. Petitioner then goes on to argue, in substance, that nothing in the remaining 30 sections of the Act should be deemed to curtail that grant of authority. Congress, however, did not see fit to pass only a declaration of purpose and a grant of rulemaking authority. It did pass the rest of the Act, and the Board cannot proceed as if Congress had been silent.

The freewheeling administrative power, advocated by petitioner, to "correct any [congressional] oversights or omissions" (Pet. 13) and to alter the "lines drawn by the statute itself" (Pet. Br. 18) is peculiarly inappropriate in the circumstances of the Truth in Lending Act. Contrary to petitioner's assertion, the Act is not a mere "rough outline" (Pet. 13) of what Congress had in mind. Congress

did not merely state a broad area of concern and direct the Board to deal with it. Rather, Congress hammered out a detailed system of regulation, setting forth with precision the matters within its coverage.* "Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions." *Ebert v. Poston*, 266 U. S. 548, 554 (1925). To be sure, the Board was called upon to provide supplementary regulations,** but it was not left at liberty to reshape the Act or to revise congressional decisions.

2. The legislative history.

The legislative history of the Act demonstrates that the plain statutory language is not the result of legislative inadvertence or oversight but was the result of an affirmative congressional decision to restrict the Act's coverage to transactions involving a finance charge. Thus, the Senate-House conference report states that the Act was designed "to assist in the promotion of economic stabilization by requiring the disclosure of *finance charges* in connection with extension of credit . . . ." CONF. REP. No. 1397, 90th Cong., 2d Sess. at 1 (1968) (emphasis added). Further, the Senate Report states:

> "[Section 1631] . . . is a prefatory section setting forth the basic requirements to disclose. It is similar

*For example, § 1638(a)(7) provides for the disclosure of

> "The finance charge expressed as an annual percentage rate except in the case of a finance charge.
>
> (A) which does not exceed $5 and is applicable to an amount financed not exceeding $75, or
>
> (B) which does not exceed $7.50 and is applicable to an amount financed exceeding $75.
>
> A creditor may not divide a consumer credit sale into two or more sales to avoid the disclosure of an annual percentage rate pursuant to this paragraph."

**See, for example, 12 C. F. R. §§ 226.6(d), 226.6(j).

> to the original S. 5, except that it is made clear that disclosure need only be made to persons 'upon whom a finance charge is or may be imposed'. Thus, the disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions, including trade credit, open account credit, 30-, 60-, or 90-day credit, etc., for which a charge is not made." S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967). The House Report is substantially identical. H. R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967).

The Senate Report also states that "[t]he basic purpose of the truth in lending bill is to provide a full disclosure of credit *charges* to the American consumer." S. Rep. No. 392, 90th Cong., 1st Sess. at 1 (1967) (emphasis added). The same intent is reflected in the House Report:

> "Title I is intended to provide the American consumer with truth-in-lending and truth-in-credit advertising by providing full *disclosure of the terms and conditions of finance charges* both in credit transactions and in offers to extend credit." H. R. Rep. No. 1040, 90th Cong., 1st Sess. 6-7 (1967) (emphasis added).

The Government's brief seeks to undermine the significance of the committee reports by reference to a variety of random statements at various hearings with respect, for the most part, to bills significantly different from the one ultimately enacted.* If those statements were in conflict with

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*Many of the statements cited by the Government (*See, e.g.*, U. S. Br. 15 n.13) were made with respect to S.5 or bills similar to it. The Senate Report specifically says that the Act's disclosure provision was altered from S.5 (which required disclosure "to each person to whom credit is extended") in order to make clear that "disclosure need only be made to persons 'upon whom a finance charge is or may be im-

the language of the committee reports, the reports, of course, would be entitled to precedence as the authentic expression of the legislative intent. *See United States* v. *International Union United Automobile, Aircraft & Agricultural Implement Workers of America*, 352 U. S. 567, 585 (1957); *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 474-75 (1921); *American Airlines, Inc.* v. *CAB*, 365 F. 2d 939, 949 (D.C. Cir. 1966); *Nicholas* v. *Denver & R. G. W. R. R.*, 195 F. 2d 428, 431 (10th Cir. 1952).

Moreover, none of the statements cited in the Government's brief indicates any expectation that the Act, or the regulations to be promulgated thereunder, would apply to transactions that did not involve a finance charge. The Government calls particular attention to a statement by Senator Douglas at a Senate subcommittee hearing on S. 1740 in July 1961 (U. S. Br. 16-17). Senator Douglas's remarks were made in response to an argument advanced by Senator Bennett that two merchants selling identical goods, *both of whom imposed a finance charge*, might disclose different finance charges as a result of making different allocations between the cash purchase price and cost of credit and that, therefore, the consumer would have no valid basis for comparison shopping. In response, Senator Douglas observed that the bill would provide the consumer with disclosure of both the cash price and the finance charges so that "the judgment of the consumer can be on the basis of both of these factors, not merely on one alone . . . ." *Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. 447-48 (1961).

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posed.'" S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967). Moreover, the definition of "credit" in S.5 was changed in the Act (§ 1602(e)) so as to exclude from the disclosure requirements those transactions where it "would seem impossible to attribute or determine a finance charge." *Hearings on S.5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 659-663 (1967).

Senator Douglas's remarks with respect to creditors who do impose a finance charge does not lend any support to the notion that Congress intended that disclosures would be required of those who do not impose a finance charge.

The Government cities (U. S. Br. 16 n. 16) other statements similar to that of Senator Douglas,* indicating a congressional concern with the problem of the identification of finance charges by those creditors who impose such charges; these statements do not indicate concern about those situations where a finance charge was not in fact being imposed. In sum, there is no support for the argument that those creditors who do not impose finance charges were intended to be reached by the Act despite its clear wording to the contrary.

On the other hand, the congressional hearings do provide further evidence that the imposition of a finance charge was understood to be a prerequisite to the Act's coverage. Thus, during the 1964 hearings before the Senate Banking and Currency Committee's Subcommittee on Production and Stabilization, a Senator asked the Chairman of the Federal Trade Commission whether an agreement with his neighbor's son under which the son would mow the Senator's lawn on successive Saturdays and the Senator would pay him 50 cents "each time he completes the job" would be within the purview of the then pending bill. *Hearings on S. 750 Before the Subcomm. on Production and Stabilization of the Senate Comm. on Banking and Currency*, 88th Cong., 1st and 2nd Sess., pt. 2 at 1298 (1964). The Chairman of the Federal Trade Commission replied that the lawn mowing transactions would not be covered. He explained:

**Hearings on H. R. 11601 Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency*, 90th Cong., 1st Sess. 590-91, 825-26 (1967); *Hearings on S. 1740 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 87th Cong., 1st Sess. 381, 563 (1961).

> "First, there must be a transaction involving 'credit' as defined in section 3(2). Second, a 'finance charge' as defined in section 3(3) must be imposed in this transaction involving 'credit' as defined in section 3(2). Third, only a 'creditor' as defined in section 3(4) is required to make the disclosure required under this act.
>
> ". . . In order to determine whether any transaction which involves credit within the meaning of section 3(2) falls within the scope of the bill, it is necessary to inquire whether a 'finance charge' is imposed; i.e., whether the borrower or credit purchaser is required to pay any amount which would not be incurred in a cash transaction." *Hearings* on S. 750 at 1304.

The Government also urges that during the seven years of hearings "everyone assumed that 'no charge for credit' simply meant that the creditor had 'buried,' 'concealed' or 'packed' finance charges in the price of the goods sold." U. S. Br. 15. As evidence of that assumption the Government quotes (U. S. Br. 15 n.14) a chief sponsor of the Act, Senator Proximire. However, moments after Senator Proxmire made the statement quoted in the Government's brief, the Senator apparently concluded that some creditors do not impose finance charges and, indeed, that the very creditor referred to in the government's quotation did not do so. Senator Proxmire said: "The fact is that Foyes is apparently not charging in his merchandise for his credit." *Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency,* 90th Cong., 1st Sess. 515 (1967). That conclusion is consistent with the views expressed in the Senate and House Reports which were before the Congress that passed the Act. Those reports specify: "disclosure need

only be made to persons 'upon whom a finance charge is or may be imposed.' Thus, the disclosure requirement would not apply to transactions . . . for which a charge is not made." S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967); H. R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967).

Accordingly, it is apparent that the Fifth Circuit's observation that "there must be found present a '*finance charge*'" before disclosure is required under the Act (App. 49) is correct. Other lower courts have come to the same conclusion. In *Esposito* v. *Nayer*, Civil No. 11-142 (D. Me., June 5, 1972), Judge Gignoux, faced with a transaction identical in all material aspects to the one at issue here, held the four installment rule invalid, saying:

> "Absent a finance charge in the transaction involved, this Court, like the *Mourning* Court, finds the Act itself inapplicable, since neither defendant is a creditor as defined by the Act. Nor is either defendant a person required to disclose pursuant to the requirements of the Act."

See Garland v. *Mobil Oil Corp.*, 4 CCH Consumer Credit Guide ¶ 99,193 at pp. 89, 134-35 (N. D. Ill. 1972) (McLaren, J.); *Otis* v. *Cowles Communications, Inc.*, No. C-71-550 RHS (N. D. Cal., Nov. 3, 1971); *Casteneda* v. *Family Publications Service*, 4 CCH Consumer Credit Guide ¶ 99,564 (D. Colo. 1971); *Bostwick* v. *Cohen*, 319 F. Supp. 875, 878 n. 1 (N. D. Ohio 1970). *See also Martinez* v. *Family Publications Service, Inc.*, No. 71-169-Civ-TC (S. D. Fla., Oct. 12, 1971). *Contra, Strompolos* v. *Premium Readers Service*, 326 F. Supp. 1100 (N. D. Ill. 1971), *certified under 28 U. S. C. § 1292(b), settled on appeal.*

B. The rule does not effectuate the purpose of the Act nor does it prevent circumvention or facilitate compliance.

In support of the validity of the four installment rule, it is urged by petitioner and amici curiae that the rule is needed to solve the problem—supposedly recognized but left unsolved by Congress—of the "buried" finance charge. The problem of the buried finance charge may well be a real problem, but it is neither presented by this case nor solved by the four installment rule.

A transaction that entails a finance charge (and meets the other requirements of the Act) is indubitably subject to the requirements of the Act—whether or not the finance charge is buried or otherwise hidden. The plain language of the Act requires that the specified disclosures be made in transactions involving finance charges. Neither the Act nor the regulations make any exception for hidden finance charges.

We do not doubt that the Board could properly facilitate compliance with the Act by establishing, on any reasonable basis, guideline formulas for the identification and quantification of finance charges in difficult cases so that merchants could make disclosures with confidence that they had done what was required of them.* Similarly, the Board

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*The object of facilitating compliance has been served, *inter alia,* by the Board's regulations with respect to the determination of the annual percentage rate. Thus, 12 C. F. R. § 226.5(c) provides in part:

> "*Charts and tables.* (1) The Regulation Z Annual Percentage Rate Tables produced by the Board may be used to determine the annual percentage rate, and any such rate determined from these tables in accordance with instructions contained therein will comply with the requirements of this section."

And 12 C. F. R. § 226.5(e) provides in part:

> "In an exceptional instance when circumstances may leave a creditor with no alternative but to determine an annual percentage rate applicable to an extension of credit other than open end credit by a method other than those prescribed in

could facilitate private enforcement of the Act by establishing rebuttable presumptions as to both the existence and the amount of finance charges so that private plaintiffs would not be faced with difficult problems of discovery and accountancy. What the Board did, however, is altogether different: it simply attempted to eliminate the finance charge requirement. In doing so, it neither furthered the purposes of the Act nor facilitated compliance with it. The attempt to expand the coverage of the Act to embrace transactions not involving a finance charge cannot solve the practical problems faced by the merchant who is required to disclose a finance charge that is hard to identify, nor can it further the purpose of achieving full and accurate disclosure of the cost of credit.

The Government attempts to resolve the problem of the hard-to-identify finance charge not by reference to the four installment rule but rather by the more extraordinary proposition that the merchant may discharge his duties under the Act by merely disclosing the aggregate purchase price without separately identifying the finance charge. The Government states that "a creditor might not be required to disclose finance charges if these were concealed in increased prices" so long as he discloses "other relevant information, such as the cash price and the total amount to be financed." (U. S. Br. 16. See also 12 n. 26.) This is simply bizarre. Nothing in the Act justifies that conclusion, which appears altogether subversive of the congressional purpose to require disclosure of the cost of credit. Had Congress intended what the Government now supposes, it was a very simple thing to provide (a) that all creditors

paragraph (b) or (c) of this section, the creditor may utilize the constant ratio method of computation provided such use is limited to the exceptional instance and is not for the purpose of circumvention or evasion of the requirements of this part."

were subject to the Act (rather than only those creditors who impose a finance charge), and (b) that, in circumstances to be specified by supplementary regulation, those creditors who could not segregate the cost of credit from the total purchase price, should disclose the total price and state that it contained an unspecified finance charge. Congress, however, did no such thing. It made the Act applicable only to those creditors who impose a finance charge and it required that that finance charge be identified.

Under the Government's thesis, even the merchant who intentionally "buries" a finance charge can meet the requirements of the Act merely by disclosing the aggregate purchase price. Moreover, the merchant with no affirmative desire to conceal would no longer have any inducement under the Act to undertake the burden of accurately identifying the cost of credit. In both situations, the consumer will be denied information as to the cost attributable to credit. Since, however, neither the Act nor the regulations afford any warrant whatsoever for the Government's invitation to non-disclosure, we believe that any merchant who accepts that invitation runs a material risk of criminal prosecution under 15 U. S. C. § 1612 and of a potentially staggering civil liability under 15 U. S. C. § 1640(a). In sum, the four installment rule cannot solve the problem of the hard-to-identify finance charge to which it was addressed, and the Government's non-disclosure rule solves the problem but only by scuttling one of the Act's principal objectives without any authority from either Congress or the Board.

Finally, it is apparent that the four installment rule does not even serve the interests of administrative and judicial economy, as claimed by petitioner and the Government. (Pet. Br. 16-17; U. S. Br. 25.) If, as the Government suggests (U. S. Br. 25), "endless legal disputes over bookkeeping practices and other matters" would result in

the absence of the rule because of the need to establish the existence of a finance charge, then similar disputes will arise, notwithstanding the rule, as to the amount of the finance charge and the accuracy of the disclosures. Those who are prompted to sue merchants making no disclosures would, if the rule were sustained, sue merchants making allegedly inaccurate disclosures—including merchants who, rightly or wrongly, would disclose that no finance charges were entailed in their transactions. So long as the Act provides that a finance charge must be accurately disclosed, the existence and amount of such charges will be a central element in litigation under the Act. Whatever the problems of proof involved, the four installment rule does not obviate them. On the other hand, in so far as the Board seeks to expand the coverage of the Act to embrace classes of merchants and transactions not covered by Congress, it can only increase the amount of litigation engendered by the Act.

C. The four installment rule is an invalid administrative attempt to extend the Act beyond its intended bounds.

Petitioner ultimately relies on the proposition that the Board was authorized to promulgate "legislative" as well as merely "interpretive" regulations and, thus, was empowered to "correct any oversight or omissions" in the Act, to "embrace a penumbra" beyond the objectives of the Act and to alter "the lines drawn by the statute itself" (Pet. Br. 18, 22, 32; Pet. 13). The argument proves either too little or too much. Since, as we have shown above, Congress explicitly and intentionally limited the coverage of the Act to transactions involving a finance charge, the exclusion of transactions not involving a finance charge can hardly be regarded as a legislative "oversight or omission". On the other hand, there is no warrant in the decisions of this

Court for the proposition that an administrative agency, however well intentioned, may simply overrule a congressional decision under the guise of exercising "legislative rule making power" (Pet. Br. 22). The legislative power of the United States is, after all, granted to Congress (U. S. Const., art. I, § 1), and while Congress may delegate legislative power under appropriate guidelines, *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 398 (1940); *United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.*, 282 U. S. 311, 324 (1931), an intent to delegate the power to override congressional determinations is not readily to be presumed, nor can it be inferred from anything in the Truth in Lending Act.

The court of appeals held that "the four installment rule of Regulation Z constituted an administrative endeavor to amend the law as enacted by the Congress" (App. 51). The court's conclusion that the Board, in promulgating the rule, had "over-stepped the authority granted to them under 15 U. S. C., § 1604" (App. 51) is clearly supported by the decisions of this Court.

In *Federal Communications Commission* v. *American Broadcasting Co., Inc.*, 347 U. S. 284 (1954), this Court was faced with an attempt by the Federal Communications Commission to prevent circumvention and evasion of § 1304 of the United States Criminal Code (formerly § 316 of the Communications Act of 1934). The statute prohibits the broadcasting of "any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance . . . ." Although the statute did not define "lottery", lotteries traditionally had been considered to have three essential elements: (1) the distribution of prizes (2) according to chance (3) for a consideration. 347 U. S. at 290.

In promulgating rules designed to prevent the broadcasting of programs prohibited by the statute, the Com-

mission was faced with a pervasive pattern of circumvention by lottery promoters. As this Court noted:

> "Enforcing such legislation has long been a difficult task. Law enforcement officers, federal and state, have been plagued with as many types of lotteries as the seemingly inexhaustible ingenuity of their promoters could devise in their efforts to circumvent the law. When their schemes reached the courts, the decision, of necessity, usually turned on whether the scheme, on its own peculiar facts, constituted a lottery." 347 U. S. at 292-93.

In particular, the question of what constituted "consideration" was one that had continually troubled the courts, and promoters had persistently exercised their ingenuity in devising new schemes, not previously prohibited. 347 U. S. at 293. The Commission, seeking to prevent continued circumvention and evasion of the statute and to achieve what it believed to be a valuable social end, adopted a regulation that eliminated consideration as a necessary element of a proscribed lottery. This Court held that the Commission had overstepped its authority under the Act. The Court said:

> "Unless the 'give-away' programs involved here are illegal under § 1304, the Commission cannot employ the statute to make them so by agency action. Thus, reduced to its simplest terms, the issue before us is whether this type of program constitutes a 'lottery, gift enterprise, or similar scheme' proscribed by § 1304." 347 U. S. at 290.

In commenting on the circumvention argument, the Court said:

> "It is apparent that these so-called 'give-away' programs have long been a matter of concern to the

> Federal Communications Commission; that it believes these programs to be the old lottery evil under a new guise, and that they should be struck down as illegal devices appealing to cupidity and the gambling spirit. . . . Regardless of the doubts held by the Commission and others as to the social value of the programs here under consideration, such administrative expansion of § 1304 does not provide the remedy." 347 U. S. at 296-97.

The instant case involves an even clearer example of invalid legislation-by-regulation since here one need not scrutinize the intricacies of the common law to ascertain the boundaries of the statutory requirement. The disclosure and penalty provisions of the Truth in Lending Act explicity apply only to transactions involving a finance charge.

It should also be noted that in *ABC*, as here, the Court was faced with a civil case arising under a statute that also provided for criminal penalties. The Court said:

> "It is true, as contended by the Commission, that these are not criminal cases, but it is a criminal statute that we must interpret. There cannot be one construction for the Federal Communications Commission and another for the Department of Justice. If we should give § 1304 the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. Not only does it lack support in the decided cases, judicial and administrative, but also it would do violence to the well-established principle that penal statutes are to be construed strictly." 347 U. S. at 296.

See Commissioner v. *Acker,* 361 U. S. 87, 91 (1959); *Keppel* v. *Tiffin Savings Bank,* 197 U. S. 356, 362 (1905).

This Court emphasized the inability of an administrative agency to go beyond its enabling act in *Addison* v.

Holly Hill Fruit Products, Inc., 322 U. S. 607 (1944). The *Addison* case arose under Section 13(a)(10) of the Fair Labor Standards Act, which exempted from the minimum wage and overtime requirements of the statute persons employed "within the area of production (as defined by the Administrator)" in certain agricultural occupations. Pursuant to that authority the Administrator defined "area of production" to include any person engaged in such an occupation "where he is employed from farms in the immediate locality and the number of employees in such establishment does not exceed seven". 29 C. F. R. § 536.2 (b) (Supp. 1938). Notwithstanding the fact that the definition of that term was expressly left to the Administrator, this Court held that the Administrator's power to define "area of production" was limited by that statutory term to the drawing of geographic lines and that his regulations, which made discriminations on the basis of the number of employees, were *ultra vires*. *See also Zuber* v. *Allen*, 396 U. S. 168, 183 (1969) ("Congress has spoken with particularity. . . . In these circumstances an administrator does not have 'broad dispensing power.' "); *Commissioner* v. *Acker*, 361 U. S. 87, 93-94 (1959) ("The questioned regulation must therefore be regarded 'as no more than an attempted addition to the statute of something which is not there.' "); *United States* v. *Calamaro*, 354 U. S. 351, 357 (1957) ("Neither we nor the Commissioner may rewrite the statute simply because we may feel that the scheme it creates could be improved upon."); *Helvering* v. *Credit Alliance Corp.*, 316 U. S. 107, 113 (1942).

Further, the four installment rule is invalid for the reasons set forth in *Miller* v. *United States*, 294 U. S. 435 (1935). In *Miller*, the plaintiff sought judgment upon a war risk insurance policy, issued by the United States pursuant to a statute authorizing protection against the risk of death or "total permanent disability." The Administrator

of Veterans' Affairs, purporting to act pursuant to authority to make such rules and regulations as might be necessary or appropriate to carry out the purposes of the act, had provided by regulation that the loss of one hand and one eye "shall be deemed to be total permanent disability under yearly renewable term insurance". That regulation the Court held invalid because it converted "total permanent disability" from a factual condition to be determined in light of all the relevant circumstances into a matter to be presumed upon the finding of more limited, specific facts. The Court observed:

> "It is invalid because not within the authority conferred by the statute . . . to make regulations to carry out the purposes of the act. It is not, in the sense of the statute, a regulation at all, but legislation. . . . *The vice of the regulation, therefore, is that it assumes to convert what in the view of the statute is a question of fact requiring proof into a conclusive presumption which dispenses with proof and precludes dispute. This is beyond administrative power.* The only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Id.* at 439-40 (emphasis added).

The same vice is present in the four installment rule. The rule converts what under the Act is a question of fact requiring proof (whether there is a finance charge) into a conclusive presumption which dispenses with proof.*

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*"In effect, the rule establishes a conclusive presumption that those who extend credit and permit payment in four or more installments have included within the price which the consumer pays for their product their cost of extending credit, notwithstanding that they may purport not to levy a finance charge. In the vast majority of cases, that presumption is in full accordance with economic reality . . . . While it is possible that there are some creditors who

The cases cited by petitioner and the Government are quite simply inapposite and do not support the validity of the four installment rule. A comparison of the statute and regulation involved in each of the cases cited fails to reveal any conflict between the act and the regulation. *Gemsco, Inc.* v. *Walling*, 324 U. S. 244 (1945), *Thorpe* v. *Housing Authority*, 393 U. S. 268 (1969), *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U. S. 203 (1964), and *National Broadcasting Co.* v. *United States*, 319 U. S. 190 (1943), all involved agency regulations or adjudications which merely constituted particularizations of the respective statutes as to matters about which Congress had not spoken with specificity and were not in any way inconsistent with an act of Congress. (324 U. S. at 261-63; 393 U. S. at 277-78, 379 U. S. at 215-217, 319 U. S. at 218-20.)*

POINT II

THE JUDGMENT OF THE COURT OF APPEALS SHOULD BE SUSTAINED ON THE GROUNDS, NOT REACHED BELOW, THAT A CIVIL PENALTY UNDER THE ACT MAY NOT BE IMPOSED IN THE ABSENCE OF A FINANCE CHARGE AND THAT FPS DID NOT EXTEND CREDIT WITHIN THE MEANING OF THE ACT.

Although the decision of the court of appeals is based entirely on the invalidity of the four installment rule, the judgment is sustained by two independent considerations that were advanced by FPS but which the court of appeals

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agree to permit payment in four or more installments without structuring the cost of extending credit into the price . . . an administrative agency . . . must be permitted to make rough accommodations even if its classifications result in some inequity . . . ." U. S. Br. in the Fifth Circuit at 24-25.

*In *United States* v. *Foster*, 233 U. S. 515, 527 (1914), the Court found the regulation there in issue to be purely administrative and said it "executed the . . . law; [but] adds nothing to it". That

did not reach.* First, we urged that, irrespective of the validity of the four installment rule, 15 U. S. C. § 1640(a) provides for civil liability only in cases involving a finance charge.** Second, we showed that the Truth in Lending Act is inapplicable here because the transaction in issue did not involve the extension of credit.*** For the reasons set forth below, the judgment of the court of appeals should be sustained on both of those grounds, regardless of this Court's determination with respect to the validity of the four installment rule. *See, e.g., Le Tulle* v. *Scofield*, 308 U. S. 415, 421 (1940), *Langnes* v. *Green*, 282 U. S. 531, 538 (1931); *United States* v. *American Railway Express Co.*, 265 U. S. 425, 435 (1924).

A. The civil penalty provision of the act is inapplicable in the absence of a finance charge.

Whether or not the disclosure requirements and the administrative enforcement provisions of the Truth in Lending Act are applicable in the absence of a finance charge, the civil liability provision, under which petitioner's claim arises, is inapplicable. The Act provides that

> "any creditor who fails in connection with any consumer credit transaction to disclose to any person

Congress can paint with a broad brush, and ban more than the target evil, *North American Co.* v. *SEC*, 327 U. S. 686 (1946), *Westfall* v. *United States*, 274 U. S. 256 (1927), is irrelevant to the issue present here of whether an agency can promulgate rules contrary to the express language of the enabling statute. *Colorado Anti-Discrimination Commission* v. *Continental Air Lines, Inc.*, 372 U. S. 714 (1963), did not involve the rule-making power of an agency, but rather the validity of a state statute in a field which Congress had sought to regulate. The conclusion there as to the scope of federal preemption has no bearing here.

*Petitioner's Reply Memorandum on Petition for Writ of Certiorari 3; U. S. Br. 4 n.4.

**FPS's Brief in the Fifth Circuit 26-30; FPS's Reply Brief in the Fifth Circuit 5-6.

***FPS's Brief in the Fifth Circuit 8-13; FPS's Reply Brief in the Fifth Circuit.

any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of

> "(1) *twice the amount of the finance charge in connection with the transaction,* except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and
>
> "(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with reasonable attorney's fee as determined by the court." 15 U.S.C. § 1640(a) (emphasis added).

Under that provision, the finance charge imposed "in connection with the transaction" provides the initial measure of the award. The minimum and maximum dollar amounts cannot reasonably be construed as providing an alternative means of determining the amount of liability in the absence of a finance charge because the language of § 1640(a) is not susceptible of an "either/or" interpretation. Indeed, Congress rejected a bill that provided for liability "in the amount of $100, *or* in any amount equal to twice the finance charge . . . whichever is the greater [up to $1,000]". S. 5, 90th Cong., 1st Sess. § 7(a)(1)(1967) (emphasis added). Moreover, this restriction in the scope of the civil liability section was accompanied by a shift in emphasis to other modes of enforcement. Thus, while the Senate bill had placed primary reliance on civil actions for insuring compliance, provision was subsequently made for administrative enforcement by, *inter alia,* the Federal Home Loan Bank Board, the Interstate Commerce Commission, the Civil Aeronautics Board, Secretary of Agriculture, and the Federal Trade Commission (15 U. S. C. § 1607), and it was expected that "primary enforcement . . . would be

accomplished under the administrative enforcement section." H. R. REP. No. 1040, 90th Cong., 1st Sess. at 19 (1967). Whatever the scope appropriate to the other provisions of the Act, it is apparent from both the language and history of § 1640(a) that an action to recover a civil penalty can only be maintained with respect to a transaction involving a finance charge.*

Two further considerations lead to the same conclusion. First, the Board has not promulgated any regulations dealing with the recovery of a civil penalty under § 1640(a). Hence, it is appropriate to read that section at least in the light of the statutory definitions rather than those adopted by the Board for other purposes. Section 1640(a) deals with the liability of a "creditor"—a term which the Act defines to refer "only to creditors who regularly extend . . . credit for which the payment of a finance charge is required" (15 U. S. C. § 1602(f)). Second, since Congress recognized that liability under § 1640(a) is penal rather than remedial in nature (*see* 15 U. S. C. § 1612) a narrow construction is particularly appropriate.** *Commissioner* v. *Acker,* 361 U. S. 87, 91 (1959); *Keppel* v. *Tiffin Savings Bank,* 197 U. S. 356, 362 (1905) ("a penalty is not to be readily implied"); *Hatfield, Inc.* v. *Commissioner,* 162 F. 2d 628, 633 (3d Cir. 1947) ("all questions of doubt must be resolved in favor of those from whom the penalty is sought").

__Ratner__ *v. Chemical Bank New York Trust Co.,* 329 F. Supp. 270, 273, 280 (S. D. N. Y. 1971) does not stand for a contrary proposition since the court there found that "there was a readily knowable 'finance charge in connection with the transaction'" and that this prerequisite serves as the "initial step" in the statute's "sole measure of damage". 329 F. Supp. at 280.

**A Congressional determination that a statutory provision is to be regarded as either penal or remedial is binding upon the courts. *Helwig* v. *United States,* 188 U. S. 605, 613 (1903). *See also United States* v. *United Mine Workers,* 330 U. S. 258, 303-304 (1947).

B. FPS did not extend credit.

It is undisputed that the disclosure and civil penalty provisions of the Act apply only to transactions involving the extension of credit. The terms of the agreement between petitioner and FPS are also undisputed. (App. 3, 6-7) Those terms do not spell out an agreement for the extension of credit to petitioner.*

It is the essence of a credit transaction that one person parts with goods in return for the promise of another to render value at a later date. FPS does not deliver goods before receiving payment for them. Quite the contrary, it is the customer who pays in advance for the later receipt of magazines. The customer pays over 30 months for magazines he will receive over 60 months. Until the last magazine has been delivered at the end of the 60-month period, the customer has paid for more magazines than he has received. Thus, if any credit is extended in these transactions, it is extended by FPS's customers to FPS and not vice versa. FPS enjoys the use of its customers' money before the customers obtain the magazines.

Nor does the fact that the customer contracts to make periodic payments turn his obligation into a credit obligation. There are many contractual relationships which are not credit relationships. As Professor Corbin has stated:

> "A transaction may be an instalment contract without being a credit transaction at all. Both parties may agree to perform in instalments without

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*The question of whether the transaction in issue involves the extension of credit was not reached by the court below. See p. 33 n. * *supra*. The Government, in its amicus curiae brief, declined to express its opinion on the issue. The Government stated:

> "Since the validity of the four-installment rule is unrelated to that question, the Board has no interest in urging that it be decided one way or the other." (U. S. Brief in the Fifth Circuit 13.)

promising to render any performance in advance of full payment of the price of each instalment so rendered. Thus, a seller contracts to deliver wheat straw at the rate of three specified loads per fortnight, for the price of thirty-three shillings per load, payable on delivery; simultaneously with each delivery, the full price of each load is to be paid. Both parties promise to perform in instalments; but neither one promises any performance in advance of its exact agreed equivalent. Neither one risks an actual performance upon the mere word of the other." 3A A. CORBIN, CONTRACTS § 687 (1960) (footnote omitted).

In sum, a promise to make periodic deliveries in exchange for a promise to make periodic payments does not in itself give rise to a credit transaction. The fact that the FPS customer completes his periodic payment obligations under the contract before FPS has completed its performance shows that FPS is even more clearly not a creditor than the seller described by Professor Corbin. The conclusion that installment contracts are not necessarily contracts for the extension of credit has been recognized by the Federal Reserve Board in a published opinion with respect to the applicability of the Act to installment plans for the payment of obstetrical services:

"As we understand the common practice for assessing obstetrical charges, the doctor and the patient agree on the services the doctor will provide and the fee for his services. This fee is payable in periodic instalments, and the obstetrical services are provided as needed. Perhaps early in the plan, the payments made by the patient exceed the charges assessed, but as the plan progresses and the child is

delivered, it may be that the charges exceed the payments. As long as there are no finance charges assessed, and at no point do the charges for the services rendered exceed the payments to the extent that it would require more than 4 of the periodic installments to repay the obligation, then the plan would not fall within the provisions of Regulation Z." FRB Opinion Letter No. 262 (1970); 4 CCH CONSUMER CREDIT GUIDE ¶ 30,516.

It is implicit in the Board's opinion (1) that the execution of an agreement to pay in installments for goods or services to be rendered in installments does not necessarily involve an extension of credit within the meaning of the Act and (2) that credit is extended under such an agreement only if and when the value of the goods or services provided exceeds the payments made.*

Accordingly, FPS does not extend credit to its customer upon the execution of the installment agreement and, since the customer undertakes to make payments at a faster rate

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*The Government has characterized the Board's opinion as follows:

"The Federal Reserve Board has issued an opinion letter . . . which may bear on the question presented here. That opinion, which deals with the common situation involving the payment in installments of a fixed fee for whatever obstetrical care may be needed during a pregnancy, seems to be based on the premise that the patient does not incur indebtedness for the total fee at the time, early in the pregnancy, when the agreement is made. Instead, the view reflected in that letter seems to be that *debt is not incurred, nor credit extended, until the medical care is actually provided and then only if the amount of the payments made by that time does not equal or exceed the value of the services rendered.* Stated otherwise, insofar as is relevant here, the opinion appears to adopt the view that, even if no payments were made, the patient would not incur debt simply by arranging with the obstetrician for periodic care and agreeing to pay, in installments, a specified sum for whatever care is needed." U. S. Brief in the Fifth Circuit 17. (Emphasis added.)

When magazines are delivered, FPS does not thereafter extend credit under the agreement. Indeed, in an effort to insure that FPS does not become a creditor, the agreement provides for acceleration of the customer's payments in the event of the customer's default. In sum, under commonly accepted principles that have been espoused by the Board, FPS is not a creditor.

The Act does not alter the common understanding of what constitutes a credit transaction*—receipt of value and an unconditional obligation to pay in the future for such value. The term "credit" is defined in the Act as follows:

> "The term 'credit' means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment." 15 U.S.C. § 1602(e).

The word "debt" is not defined in the Act. "Debt" has been defined, however, frequently and consistently by the courts. The essence of "debt" is an unconditional promise to pay a fixed sum at a future time.

> "The classic debt is an unqualified obligation to pay a sum certain at a reasonably close fixed maturity date along with a fixed percentage in interest payable regardless of the debtor's income or lack thereof." *Gilbert* v. *Commissioner*, 248 F. 2d 399, 402 (2d Cir. 1957). *Accord, Sherwood Memorial Gardens, Inc.* v. *Commissioner*, 350 F. 2d 225 (7th Cir.

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* "[T]he disclosure requirement would not apply to transactions which are not commonly thought of as credit transactions . . . ." S. Rep. No. 392, 90th Cong., 1st Sess. 14 (1967); H. R. Rep. No. 1040, 90th Cong., 1st Sess. 25 (1967). "It did not attempt to alter or amend the pattern of legal rights and remedies afforded consumers and creditors under state law." 114 Cong. Rec. 14487 (1968) (remarks of Senator Proxmire).

1965); *Forty Realty Corp.* v. *Commissioner,* 279 F. 2d 701 (2d Cir. 1960).

"Every debt must be solvendum in praesenti, or solvendum in futuro—must be certain and in all events payable; whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a debt." *Burton* v. *Bowers,* 172 F. 2d 429, 432 (4th Cir. 1949) (citations omitted). *Accord, Gilman* v. *Commissioner,* 53 F. 2d 47 (8th Cir. 1931); *State* v. *Smith,* 335 Mo. 825, 74 S. W. 2d 367 (1934).

"A 'debt', of course, is commonly considered to be a fixed and certain obligation, as opposed to something payable only on a contingency." *Jaramillo* v. *McLoy,* 263 F. Supp. 870, 874 n. 3 (D. Colo. 1967). *Accord, Jamison* v. *United States,* 297 F. Supp. 221, 227 (N. D. Cal. 1968), *aff'd per curiam,* 445 F. 2d 1397 (9th Cir. 1971).

A debt is to be distinguished from the binding obligations of a contract under which the performance of both parties lies in the future. *See, e.g., United States* v. *New York, New Haven and Hartford R. R.,* 276 F. 2d 525, 530 (2d Cir. 1959), *cert. denied,* 362 U. S. 961, 964 (1960); *McGee* v. *Stockes' Heirs at Law,* 76 N. W. 2d 145, 156 (N. D. 1956). A debt is not merely a promise to pay money. *Evans* v. *Kroh,* 284 S. W. 2d 329, 330 (Ky. Ct. App. 1955); *Park & 46th St. Corp.* v. *State Tax Commission,* 295 N. Y. 173, 178, 65 N. E. 2d 763, 765 (1946). Thus, for example, in deciding whether a municipality's contract to pay for water services resulted in indebtedness in excess of the permissible debt limit, the Court in *Walla Walla City* v. *Walla Walla Water Co.,* 172 U. S. 1, 20 (1898), made the following distinction:

"There is a distinction between a debt and a contract for a future indebtedness to be incurred, pro-

vided the contracting party performs the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed." (Emphasis added).

See also Metropolitan Water District v. *Marquardt*, 59 Cal. 2d 159, 379 P. 2d 28, 28 Cal. Rep. 724 (1963).*

The FPS contract calls for performance in overlapping installments by both parties and is therefore inherently conditional. The customer's obligation to pay money is contingent upon continuing partial performance by FPS. As Professor Corbin has explained,

> "A contract for the sale of goods may be an instalment contract with respect to the goods sold as with respect to payments of the price. The non-delivery of an instalment or delivery of a nonconforming instalment when required by the contract is a breach for which an action can be maintained at once.* There

*The term "debt" is given the same construction for federal income tax purposes as the Supreme Court gave it in *Walla Walla*. There is no valid debt which would allow a bad debt deduction under § 166 of the Internal Revenue Code unless someone had an *unconditional* obligation to pay the taxpayer. See cases collected in 5 J. Mertens, The Law of Federal Income Taxation § 30.03 n.29 (1969). The existence of a note is not in itself conclusive of the existence of a debt. *John Kelley Co.* v. *Comm'r*, 326 U. S. 521, 530 (1946).

is no doubt also that the buyer is privileged to withhold payment of the price of the undelivered instalment or of a nonconforming instalment that is rightfully rejected." 3A A. CORBIN, CONTRACTS § 691, at 264 (1960).

In the circumstances described by Professor Corbin the buyer is obligated to pay only if the seller performs. Hence, the buyer has not incurred an unconditional obligation—*i.e.*, he has not incurred a debt nor received credit; the contractual obligation is conditional, whereas a debt must be certain.

The district court rested its conclusion that FPS extended credit to petitioner on three propositions: (1) "the promise to pay is unconditional and non-cancellable"; (2) "the written agreement provides that '[p]ayments due monthly, otherwise entire balance due' "; and (3) "Defendant, itself, considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff." (App. 34). The first proposition is incorrect as a matter of law. The second proposition is not relevant to the conclusion reached. The third proposition is neither correct nor relevant.

With respect to the first proposition, as shown above, petitioner's promise to pay was conditional as a matter of law. Certainly, if petitioner had not received her magazines, no court would have required her to continue making payments for them. *See* FLA. STAT. §§ 672.2-612, 672.2-711, 672.2-717 (1969). *Cf.*, *Bowers* v. *Dr. P. Phillips Co.*, 100 Fla. 695, 129 So. 850 (1930). The fact that the contract was noncancellable at the election of petitioner does not make her obligation to perform unconditional. Her obligation was conditional on performance by FPS. See 3A A. CORBIN, CONTRACTS §§ 687, 691 (1960).

With respect to the second proposition, the fact that under the agreement FPS could require payment of the full balance if petitioner, in breach of the agreement, defaulted does not show that FPS undertook to extend credit. At every stage in the transaction the petitioner was to pay in advance for the magazines she was to receive. The "balance due" clause only underscores FPS's determination that magazines not be delivered prior to payment so that it would not be put in the position of a creditor, either voluntarily or involuntarily, and that the customer be held to her initial undertaking for prepayment.

Finally, the district court's statement that FPS "considered the transaction to be a credit transaction, and that it was owed a debt by the Plaintiff", (App. 34) presumably refers to collection letters sent petitioner after she failed to make payments. Surely the fact that petitioner *became* indebted when she failed to pay, although she was receiving the magazines she had ordered, does not show that the contract provided for the creation or deferment of such debt. Petitioner's breach of her contractual obligation to make prepayment did not retroactively convert the underlying transaction into a credit transaction within the meaning of the Act. *Cf.* 12 C. F. R. § 226.4(c). Just as a store can hardly be said to extend credit to a shoplifter, such an involuntary extension of credit does not convert the original agreement into a credit transaction subject to the Act. In any event, FPS' characterization of the status of the transaction after petitioner's default is not determinative of the legal significance of the original agreement. *See Garland* v. *Mobil Oil Corp.*, 4 CCH *Consumer Credit Guide* ¶ 99,193 at p. 89,135 (N. D. Ill. 1972) (McLaren, J).

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

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Respectfully submitted,

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